Employment

CHAPTER CONTENTS

Introduction

It is important that all employees have a good understanding of the unique nature of the employer/employee relationship and what their rights and obligations within that relationship might be.

First and foremost, an employment relationship is a contractual one, freely entered into between the employer and the employee. Like all personal contracts that are entered into voluntarily, the parties have a large amount of latitude with which to determine for themselves what terms and conditions will govern the employment relationship.

Of course, it is generally the case that the employer is in a far stronger bargaining position than the employee, and there may often be no genuine sense of bargaining. Rather, a prospective employee will often be presented with a set of terms and conditions with little room to discuss, let alone negotiate.

In addition to and sometimes instead of a written contract, the employment relationship will often be regulated by either an industrial award or a collective or enterprise agreement.

Employment Legislation

Legislation passed by state and federal governments requires both employer and employee to regulate their conduct in relation to one another by imposing certain minimum standards. In that regard, relevant minimum standards are imposed in Queensland by the:

- *Industrial Relations Act 2016* (Qld) (Industrial Relations Act)
- *Anti-Discrimination Act 1991* (Qld) (Anti-discrimination Act)
- *Work Health and Safety Act 2011* (Qld) (WHS Act)
- *Workers' Compensation and Rehabilitation Act 2003* (Qld) (WCR Act).

Employees who are employed in the Queensland public sector or by a Queensland local government are covered by the above legislation, however, the unique position of those employees is beyond the scope of this chapter.

All employees who are employed by an employer other than the Queensland public sector or a Queensland local government are covered by the *Fair Work Act 2009* (Cth) (Fair Work Act). The Queensland Industrial Relations Act mirrors numerous provisions in the Fair Work Act including those related to workplace bullying and harassment, and general protections.

In addition, there are various federal laws dealing with discrimination, which impact on all contracts of employment.

Despite federal control of industrial relations, there are still some elements of the working relationship that continue to be regulated by state legislation.

In Queensland, a compulsory workers' compensation scheme is provided by the WCR Act, requiring all employers to insure their employees against injury or illness occurring at work, or in circumstances

that are considered to be work related. Similarly, the Anti-discrimination Act and WHS Act also apply to employees in the federal system.

The Fair Work Act and Modern Awards

The objective of the Fair Work Act is that modern awards (each comprises 10 allowable matters) form the basis of a safety net for all employees, particularly lowly paid employees, together with 10 National Employment Standards (discussed below). The conditions contained in a modern award and the National Employment Standards represent an employee's minimum entitlements.

It is possible for employers and employees collectively to agree to alternative terms to those contained in a modern award (though not the National Employment Standards) by making an enterprise agreement. However, any such enterprise agreement must be approved by the Fair Work Commission (FWC) and leave the employees better off overall.

The Fair Work Act also makes it possible for employers and employees to make both individual common law agreements and Individual Flexibility Agreements (IFA). Not only are those agreements required to comply with the National Employment Standards, they are also required (where relevant) to at least meet the minimum standards set by an otherwise applicable award.

The Fair Work Act prevents employers from requiring an employee to enter into an agreement that removes basic award benefits (unless satisfactory compensatory benefits have been included).

As previously mentioned, all modern awards are limited to 10 allowable matters. These are:

- minimum wages
- types of employment (e.g. full time, part time or casual)
- arrangements for when work is performed
- overtime rates
- penalty rates
- annual wage or salary arrangements
- allowances
- leave and leave-loading arrangements
- superannuation
- procedures for consultation, representation and dispute resolution.

How an award works

Awards set out minimum terms and conditions with which employers and employees must comply. These terms cover all the important matters of the employment relationship, such as rates of pay, the number of hours and the spread of hours over which employees may lawfully be required to work, the circumstances in which employees are entitled to be paid overtime, leave and superannuation entitlements, and termination and redundancy arrangements. An award may also cover practical

matters such as the wearing of a uniform, the provision of tools and other matters related to employment.

Employers are required to know which awards are relevant to their workforce and are required to post a copy of the award in a prominent location so that its terms and conditions can be read by every employee. It should not be assumed, however, that if no award is displayed the workplace is award-free. Employees at a workplace covered by an enterprise agreement, or a collective or certified agreement should also be told of that fact, and a copy of the agreement should be made available to them on request.

In the federal system, it is unlawful, in the absence of a properly made enterprise agreement, for parties to contract out of an award. In other words, if an award provides for a minimum rate of pay then, in the absence of some properly made enterprise agreement, it will be unlawful and therefore ineffective for the parties to agree on a lesser sum to be paid. It is not unlawful to improve on or increase the minimum conditions prescribed by an award.

Penalties apply for employers who breach terms of awards.

The Fair Work Act regulates enterprise bargaining. It is worth repeating that the purpose of introducing the modernised award structure, with its 10 allowable matters to work in conjunction with the National Employment Standards, was to ensure that there is a fixed and fair safety net below which no employee may fall in terms of their employment conditions.

National Employment Standards

The 10 minimum employment entitlements listed in the National Employment Standards are an integral part of the federal system of industrial relations and relate to:

- maximum hours of work per week
- parental leave and related entitlements
- flexible working arrangements
- annual leave entitlements
- personal, carer's and compassionate leave entitlements, and unpaid family and domestic violence leave
- community service leave entitlements
- public holidays
- provision of a Fair Work Information Statement
- termination of employment and redundancy pay
- long service leave entitlements.

Unlike award terms and conditions, National Employment Standards apply to all employees no matter how well paid, how senior or how junior they are. This means that regulated minimum terms of

employment apply to a range of senior and other management employees as well as professional, and administrative and technical employees.

A feature of the National Employment Standards is that no employer or employee is lawfully able to contract out of or negotiate around the standards. Agreements can be made that add to or supplement the standards but only if the benefit of the standards is retained.

Enterprise or Collective Employment Agreements

An enterprise agreement can be made between an employer and a group of employees. Under the Fair Work Act, trade unions can apply to the FWC to be covered by an enterprise agreement. Where the majority of employees in a workplace wish to bargain with their employer, the employer will be required to bargain with them pursuant to the Act's provisions.

An agreement is made when a majority of the relevant employees cast a valid vote in favour of an agreement.

To become effective, an enterprise agreement under the Fair Work Act must be submitted to and approved by the FWC. The FWC assesses the agreement against a 'better off overall' test as mentioned above.

Unions can play an important role in the enterprise bargaining process. If a group of employees or even one employee belongs to a union and would like that union to assist them in the bargaining process, the Fair Work Act requires an employer to recognise the union as a bargaining representative for those purposes.

There are some detailed and complex provisions that relate to the process of bargaining and the various orders that can be obtained if the parties' negotiations are unsuccessful, including an application for a secret ballot to enable employees to take protected industrial action in support of their collective position. These provisions are beyond the scope of this chapter.

Enterprise agreements will be either single enterprise or multiple enterprise agreements made between two or more employers who agree to bargain together. A greenfields agreement (i.e. an agreement made between an employer and a union in respect of a site for which there are currently no employees) is permitted under the Fair Work Act.

The benefit of an enterprise agreement for a workplace is that it will last for a specified period of time and will cover every employee whose classification is covered by that agreement, including new employees who start work after the date of the agreement.

Under an enterprise agreement, an employer can agree with a union or its employees to trade off award terms that they consider to be unhelpful or inflexible in terms of the business. However, no trade off can be enforced unless there is some satisfactory compensatory condition included in the agreement to compensate for that.

Once an agreement has passed the 'better off overall' test, it will take precedence over the terms of any award or any private employment contract to the extent that there is a discrepancy, particularly if that discrepancy is against the interests of the employee. Should the private contract contain a discrepancy that is in favour of the employee, that term will prevail.

Individual Employment Contracts

For the reasons set out above, most employment relationships are governed by a modern award or an enterprise agreement. Except in limited cases, it is no longer lawful for an employer to offer or to require an employee to accept an individual statutory agreement (e.g. an Australian Workplace Agreement or an Individual Transitional Employment Agreement). An exception to this is for an IFA. An IFA can be made where an employer and employee genuinely agree to vary a term of a modern award. The employer must ensure that any IFA results in the employee being better off overall than if no IFA was entered, and it must be in writing and signed. If the employee is under 18 years old, the employee's parent or guardian must sign the IFA. An IFA can be terminated in accordance with the process set out in the relevant award.

An employer and an employee may still enter into a private or common law contract that governs the employment relationship. If a job is genuinely award free and there is no other industrial arrangement, then the contract (together with the National Employment Standards) will be the main source of rights and obligations.

Although it is an important document, an employment contract does not have to be in writing. An employment contract can be formed following little more than a conversation and a handshake.

Whatever the circumstances, there will always be a number of basic terms and conditions, and it is wise to have agreed upon them before the start of the employment. It is always going to be easier to agree about the terms of the relationship when the employer and employee are on good terms. If employees wait until a problem has arisen, it may be too late to expect to agree with their employer as to how the issue should be dealt with.

While it is permissible for the parties to amend or vary their agreement, it is not permissible for the employer or employee to make unilateral changes to the agreement.

Standard terms and conditions

Title and nature of the role

It is often helpful for the parties to have agreed to a number of key aspects of a particular role, and for the employer to identify the more important standards or targets that the employee is expected to meet.

A contract should identify the person or the position to whom the employee must report and from whom that employee should take instructions. Similarly, any supervisory responsibilities of the employee should be clearly identified.

Period of employment

Usually, a contract of employment has no set period of time. This arrangement will continue until such time as one of the parties chooses to bring it to an end in accordance with the termination provisions in the contract (see Termination below).

In some cases, a contract is specifically designed to run for a set period of time (fixed-term or fixed-period contract) or is made to fulfil a specific purpose. Where such a need arises, particular attention should be given to the termination clauses to make sure that they are compatible with the fixed term

or specific purpose. If a contract can still be terminated at any time by giving notice, it is better described as a contract of nominal duration.

Where a contract is entered into for a fixed period of time or for a particular purpose, consideration should be given to whether the parties will renew or refresh their relationship when that initial period or purpose comes to an end. If so, attention should be paid as to whether the renewal will be for one further period or whether the contract is perpetually renewable, and what terms continue to apply to the ongoing contract.

Employers sometimes believe that the establishment of a contract for a fixed period will relieve them from what they perceive to be the difficulty created by unfair dismissal law. While there is an exception to unfair dismissal law that relates to fixed-term contracts, it is a narrow exception.

Remuneration

It is fundamental to a contract that the parties agree upon exactly how much an employee is to be paid. If non-cash benefits such as the provision of a car, mobile phone or accommodation are to be provided, then specific mention should be made of these benefits. It is usual for an employer and an employee to agree on the total value of a package. The value of the total package will be relevant when considering whether or not an employee is entitled to apply for relief in the event of an alleged unfair termination. This will be discussed in Unfair Dismissal.

Superannuation

All employees who earn above a fixed minimum amount per calendar month must, according to federal legislation, have a minimum percentage of their ordinary time earnings paid into a complying superannuation fund by the employer. These contributions are a statutory obligation imposed upon the employer.

While the parties cannot opt out of this minimum standard by agreeing to have a smaller contribution paid, it is open to the parties to agree for additional amounts of the employee's salary to be paid into superannuation. These salary sacrifice arrangements should be specifically discussed with the employer, who will generally be willing to make such payments provided they are lawful and can be undertaken without any unnecessary administrative difficulty.

While most employers and unions will have complying superannuation funds to which they would like to direct their employees, legislation now requires an employer to allow an individual employee to choose their own complying superannuation fund. Certain industrial awards and agreements may specify the funds from which the employee may choose.

Leave entitlements

Irrespective of jurisdiction, there are minimum standards relating to leave entitlements that cannot be compromised by the employer.

The National Employment Standards provide compulsory minimum standards applicable to all employees relating to annual leave, personal leave (which includes personal sick leave, carer's leave and compassionate leave) and parental leave.

It is unlawful to contract out of the National Employment Standards and, to that extent, leave entitlements cannot be compromised.

Generally, the federal and state leave standards are much the same. It is helpful to look at the different types of leave available to employees in a little more detail.

Annual leave

Every full-time permanent employee is entitled to take four weeks (i.e. 20 working days) of annual leave, exclusive of any public holidays that fall within the leave period. Continuous shift workers are entitled to five weeks of annual leave per annum. That leave entitlement accrues month by month during the period of employment. If an employee chooses to resign or is dismissed prior to the completion of one year, the employee is nevertheless entitled to the pro-rata value of that leave calculated by reference to the length of the actual employment.

Similarly, a part-time permanent employee is entitled to four weeks (20 working days) of annual leave, but the entitlement is pro-rated in the same proportion as their part-time work relates to a full-time working week.

Casual employees have no entitlement to annual leave or personal leave. Under modern awards, casual employees are entitled to a casual loading. That loading is calculated to compensate for the absence of benefits such as annual leave, which are not a feature of the casual employment relationship. Casual employees can make a request for their employment to be converted to permanent status if they have been employed by the employer for a minimum period of 12 months and have worked a regular pattern of hours on an ongoing basis that, without a significant adjustment, they can continue to work as a permanent full-time or part-time employee. Casual employees must also be provided with a Casual Employee Information Statement at the commencement of their employment, which contains information about making a request for their casual employment to be converted to permanent.

Unless it is otherwise specifically provided by an industrial instrument, unused annual leave accumulates from year to year without limit.

As employers often prefer that employees do not accumulate too much annual leave, contracts of employment will often require an employee to take periods of leave on a regular basis.

The WorkChoices legislation added the notion that in some strict circumstances employees could cash out part of an accrued but unused leave entitlement. The Fair Work Act contains a provision that enables both employers and employees to manage the amount of unused leave that has accrued to a particular employee.

Ideally, leave should be taken at a time that is agreed between employer and employee. If, however, agreement cannot be reached, the employer may direct that leave be taken and further direct that leave be taken at a particular time. In those circumstances, the employer must give appropriate notice to the employee as to when leave is to commence.

The employee is entitled to be paid in advance for any leave to be taken. Payment is made at the rate of ordinary time earnings applicable to the employee at the date upon which leave is taken. However, many modern enterprise agreements and common law contracts awards provide for a loading (usually

17.5%) to be paid in relation to any period of leave. This is known as annual leave loading. Once again, the loading must be paid prior to the employee going on leave.

If upon the termination of the employment there is an amount of annual leave accrued but unused, the employee is entitled to receive the value of that accrued leave together with any applicable annual leave loading.

Personal leave

Personal leave encompasses what was previously referred to as sick leave (i.e. leave available to an employee for reasons of personal injury or illness). It also encompasses carer's leave, which allows an employee time off to care for:

- a spouse or de facto partner
- a child, parent, grandparent, grandchild or sibling, either of the employee or of the spouse or de facto partner
- a household member.

The annual entitlement for a full-time permanent employee is 10 days and is not divided up between sick leave and carer's leave.

The employer is entitled to require a medical certificate, and the rules relating to just when a certificate may be required will vary depending upon the terms of the contract. Typically, awards and agreements will require a certificate when an absence is in excess of two days. Sometimes, a certificate will be required for a shorter absence, particularly if an employee has been absent on a regular basis over a long period of time.

Compassionate leave

Compassionate leave entitles an employee to take up to two days leave as necessary when a member of the employee's immediate family or household contracts or develops a personal illness, suffers a personal injury that poses a serious threat to their life or dies. An employee is entitled to take up to two days leave per event. Once again, some reasonable evidence of this may be required by the employer.

The positive obligation to provide a medical certificate for absences in excess of two days does not mean that the employer cannot require a certificate for an absence that is shorter than two days. Unless an industrial award or agreement contains a contrary provision, the employer may, in their discretion, always require the employee to justify an absence on sick leave.

Parental leave

Permanent employees who have been employed for at least 12 months and long-term casual employees (i.e. those who have been in employment with the same employer for two years or more) are entitled to take up to 52 weeks unpaid parental leave around the birth of a child. Leave can be taken by either spouse although both spouses cannot take parental leave at the same time. Leave should be taken by the child's primary caregiver, which may be either parent. An employee is able to take up to 30 months of their 52 weeks of unpaid parental leave flexibly (i.e. on a single day basis) within the first two months of the birth or adoption of a child.

Recent amendments to the Fair Work Act enable an employee to access unpaid parental leave if their child is stillborn or passes away within the first 24 months of life. The amendments also enable an employee and employer to agree to suspend a period of unpaid parental leave until a newborn child is discharged from hospital if the child remains in hospital or is immediately hospitalised following birth (this enables an employee to access their personal leave entitlements during that period).

The obligation on the employer, provided the employee gives appropriate notice (and this should be checked with the employee when the need arises), is to allow the employee to return to the position that the employee left in order to go on parental leave.

Most employers have extensive policies relating to the operation of parental leave within their businesses. While the general principles cannot be diluted or changed in any way, there may be particular requirements around the giving of notice of which the employee should be aware before taking leave.

Long service leave

In Queensland, the Industrial Relations Act sets the guidelines for long service leave.

The basic prescription for long service leave is that any employee who has completed 10 years of service with one employer is entitled to 8.6667 weeks long service leave.

It is unlawful for an employer to pay or for an employee to receive payment in lieu of long service leave unless the employment has been terminated or it has been permitted by the Queensland Industrial Relations Commission (QIRC) upon application.

In the event of an employee's position being terminated after more than seven but less than 10 years of service, the employee may be paid out the value of the accrued but unused long service leave. The calculation is made on a pro-rata basis.

In these circumstances, however, the employee is only entitled to the value of the accrued long service leave if the cessation of the employment occurred due to the following reasons:

- The employer dismissed the employee for a reason other than the employee's conduct, capacity or performance.
- The employer unfairly dismissed the employee.
- The employee resigned, but only if the reason for the resignation was:
    - the illness or incapacity of the employee
    - some domestic or other pressing necessity.

Termination

If the employee commits a serious breach of the employment agreement, the contract may be brought to an end at once or summarily. An employee who is summarily dismissed is entitled to be paid up to but not beyond the last date of the employment. An employee who is summarily dismissed is entitled to be paid all of their accrued leave entitlements, which may include annual leave and long service leave. It is therefore helpful to have a short list of the types of events that may be so serious as to justify summary dismissal.

Typically, acts of fraud or theft will be regarded as conduct sufficiently serious to justify summary dismissal. Physically or verbally abusing staff or, depending upon the nature of the employment, staff being charged or convicted of a serious criminal offence may also be sufficient to justify summary dismissal.

Aside from summary dismissal, a contract must be brought to an end by the giving of notice. If the parties do not provide for any notice period in their agreement, the law will default to what is known as reasonable notice. Just what is reasonable will depend upon a whole range of factors, including the seniority of the position and length of service.

The rationale for a period of notice is that it should represent either the length of time that the employee might take to find a satisfactory alternative position, or the time an employer might take to find a suitable replacement employee. Obviously, the more senior the position, the older the employee and/or the longer that employee has been with the employer, the longer the period of notice will need to be.

In any event, the National Employment Standards provide for minimum default periods of notice depending on the length of service.

Minimum notice periods

The required minimum notice periods for termination under the Fair Work Act are for service:

- less than one year—one week
- more than one year but less than three years—two weeks
- more than three years but less than five years—three weeks
- more than five years—four weeks.

If the employee being dismissed is over 45 years of age and has completed at least two years of continuous service with the employer, the relevant period is increased by one week.

It happens quite often that, when the employer terminates the services of an employee, the employee is not required to work for the period of notice and the employee is entitled to be paid in lieu of notice. This is quite different from summary dismissal.

Similarly, where an employee resigns and is obliged to give four weeks of notice, with the agreement of the employer the employee can either work out that period of notice or be paid the value of that period. The employer cannot require the employee to finish up any earlier than the end of the proper notice period unless the balance of payment for the notice period is paid to the employee.

If the employee fails to give adequate notice, then the employer is entitled to forfeit the requisite amount of wages or salary from any monies that are owed by the employer to the employee upon termination.

Confidentiality

Every employee is under a duty of good faith. That means the employee must work diligently and faithfully in the service of the employer and must not, for example, undertake any activity that is in conflict with the interests of the employer.

For example, during the course of employment, an employee must not use information about the employer's business, its customers or clients to assist the business of a competitor, or store up that information for use in the employee's own business later, in competition with the employer.

Similarly, if the employee is in possession of a trade secret or other information that is properly regarded as being confidential, then the employee is under a continuing duty to keep that confidentiality even after the termination of employment.

The categories of information properly regarded by the law as confidential are limited. It will not necessarily include names and addresses of clients. If an employer wishes to limit a former employee's right to contact clients, then other steps must be taken. Generally, a clear distinction will be made between the right of an employer to protect their legitimate commercial interests (e.g. by safeguarding a trade secret) and a desire simply to prevent a former employee from competing against the employer.

Post-contractual restraints

Employers often seek to restrain former employees from making contact with clients and customers after termination of employment. The law is mindful of the distinction between a desire on the part of an employer to prevent a legitimate commercial (business) interest and to restrict competition. Such restraints are considered unlawful unless the employer can show that the restraint goes no further than is necessary to protect the employer's legitimate interests. The scope of the restraint and the length of time for which it runs will be considered.

There is an art to the drawing of restraint clauses in a form that will be accepted as valid and binding, and of course not every situation will require the imposition of a restraint. Legal advice should be sought if an employee is uncertain about a restraint clause in their employment contract.

Unfair Dismissal

An application for unfair dismissal does not depend upon the lawfulness of any action. Rather, the action is based upon an allegation that the employer's action in terminating the employment was harsh, unjust or unreasonable.

An unfair dismissal application must be made within 21 days of the date the dismissal takes effect.

As set out above, all of Queensland's private sector employers together with all of their employees, must pursue their industrial relations issues in the federal jurisdiction (i.e. in the FWC) pursuant to the Fair Work Act. This applies to claims for unfair or unlawful dismissal. State and local government employees will need to pursue their claim in the QIRC pursuant to the Industrial Relations Act, which will not be discussed here.

Who may apply?

The categories of employees who will be excluded from making a claim for unfair dismissal under the Fair Work Act include employees:

- who are working a qualifying period (see below)
- subject to training arrangements

- on a short-term casual basis (i.e. an employee who has been engaged for less than six months)
- engaged for a fixed term, specified task or specified season
- not covered by a modern award or enterprise agreement whose annual rate of earnings exceeds the high-income threshold (indexed each July)
- where the termination was a genuine redundancy.

Qualifying period

For the purpose of unfair dismissal, any contractual probationary period to be served by the employee becomes irrelevant, and the focus instead is on the qualifying period of employment. An employee who is serving a qualifying period cannot make an application for unfair dismissal. A qualifying period is the first six months of employment. In the case of a small business, that period is extended to 12 months.

Fixed-term or specific-purpose employment

If a contract has been entered into genuinely for a fixed period of time or to achieve a particular purpose, there can be nothing unfair if, at the end of the agreed period or when the agreed purpose has been completed, the employment comes to an end. This, after all, is what the parties had agreed to at the beginning of their arrangement.

The FWC will not deny access to an employee engaged upon such an arrangement if it considers that the employer's main purpose in making the arrangement was to avoid the application of the unfair dismissal provisions.

Also, the fact that a contract is for a fixed term does not exclude unfair dismissal applications where the employment is terminated before the end of the term.

It sometimes happens that an employer engaging an employee on a fixed-term contract will extend that fixed term multiple times. Once a contract of this kind has been extended, a subsequent dismissal will become harder to defend on the basis that the contract was entered into for a fixed term.

Financial threshold

An employee engaged under an award or enterprise agreement is protected from unfair dismissal irrespective of the level of remuneration. For all other employees, the high-income threshold is currently $158 500 (until July 2022).

Genuine redundancy

Financial, technological or structural reasons can mean that an employer no longer requires a particular job or jobs to be undertaken.

A financial downturn in the affairs of the business may mean that there is a reduction in the output of a factory. If that requires fewer employees, then some positions will become redundant. Similarly, an upgrade in the technology used by a company may mean that some employees no longer have the necessary skills to operate the new technology, or some jobs are no longer required to be done because they have been replaced by new technology.

In these circumstances, the position affected is said to have become redundant. It is the position rather than the person that becomes redundant.

If a genuine redundancy involves the overall reduction in the number of employees required, or if the change means that employees are no longer properly skilled or qualified, they should be redeployed if other suitable positions can be found. If not, those employees may have to be dismissed.

The Fair Work Act requires the employer to establish that they have conducted themselves fairly and properly in relation to that redundancy. For example, a standard condition in an enterprise agreement may require an employer to consult, either with employees or with their union, before announcing a program of redundancy. Failure to consult as required may mean the redundancy is not a genuine redundancy. Likewise, a failure to exhaust redeployment options may prevent the redundancy from being genuine. A dismissal that is otherwise a genuine redundancy may still be an unfair dismissal within the meaning of the Fair Work Act if these things have not occurred.

It is helpful to seek legal advice about whether a termination constitutes an unfair dismissal, as these issues have become somewhat technical and are difficult to understand.

Harsh, unjust or unreasonable dismissal

A dismissal is unfair if it can be said to be harsh, unjust or unreasonable.

This expression relates to termination that concerns the conduct, performance or capacity of an employee.

There are no absolute rules, and circumstances will always alter cases. For that reason it is very hard to see one decision as a reliable precedent for another.

For a dismissal to be fair, the reason must be seen to be sufficient, and the process must also be fair. This includes making sure that the employee understands the reason for the dismissal enough to respond to it.

The employee should also have been given a proper opportunity, if appropriate, to correct the conduct or non-performance, and the employee must also have been made aware that such conduct or performance (if uncorrected) was likely to result in the termination of their employment.

It is commonly believed that for a dismissal to be fair, an employee must receive three warnings. There is no legal basis for this belief.

For example, if an employee had stolen money from their employer or a fellow employee and had been caught doing so, most people would readily accept that dismissal was a necessary and expected outcome. Even in the absence of any warnings, there would seem to be nothing unfair about the employer's action.

On the other hand, if after 10 years of good and faithful service, an employee arrives 10 minutes late for work one morning and is dismissed for that reason, most people would consider the employer's action to have been unfair for three reasons: one, the nature of the offence was not of itself something so serious as to justify dismissal; two, there was no previous history to place the present offence in a more serious light; and three, no indication had been given by the employer that the position was at

risk for such a trivial reason. For each of these reasons, the decision to terminate would plainly be unfair.

That is not to say that constantly arriving late could never form the basis of a dismissal. However, to justify dismissal in such circumstances, some earlier warning and/or counselling process warning the employee that continuing such conduct would result in their dismissal would have had to have happened.

An employee is entitled to be put on notice if their performance is considered unsatisfactory, told clearly why it is considered unsatisfactory, what improvements are required to be made and time frames for the improvements. Only if there is no sufficient improvement can dismissal be considered. In this regard, it will be helpful for the employer and the employee to have agreed on key performance indicators or targets to be achieved against which performance can readily be measured.

Small Business Dismissal Code

A dismissal is not unfair if the employer employs fewer than 15 employees at the time of dismissal or notice of the dismissal (whichever was first), and the employer complies with the Small Business Fair Dismissal Code.

Transmission of business

Where a business is sold, it is not uncommon for the employees of the vendor's business to transfer to the purchaser's business at the moment of sale.

Technically, these employees have all become redundant so far as the vendor's business is concerned, but none of these employees are losing their employment in any real sense. Generally, awards and agreements make provision for what will happen to employees in these circumstances. Provided the transferring employees lose no benefits and retain continuity of service, they are not generally entitled to receive any severance payment.

The transmission of business principles in the Fair Work Act ensure that employees whose employment is transferred in such circumstances retain the continuity of their employment, notwithstanding the change of employer.

Dismissal generally

It is difficult to provide an exhaustive definition of the kind of conduct that will be acknowledged as sufficient to justify dismissal. The context in which the conduct occurs is important but, as social conditions change, certain conduct will become more or less acceptable.

As always, it is appropriate to consider the circumstances in which behaviour is alleged to have occurred. There is, for example, a difference between a factory worker using obscene language to a workmate on the factory floor and a receptionist at a five-star hotel using the same language to a guest. It will also be important for the employer to have conducted a proper investigation into allegations of misconduct or poor performance and to have allowed the employee an opportunity to respond to any allegations that are made.

Remedies for unfair dismissal

The primary remedy for unfair dismissal is reinstatement. If the FWC is satisfied that the conduct of the employer was harsh, unjust or unreasonable, it will assess whether reinstating the employee is possible. The FWC will not reinstate an employee if it believes the future working relationship is untenable. While this may cause hardship for the employee, the FWC will not consider it reasonable to re-establish a working relationship that is simply not going to work.

The alternative remedy is compensation. Anything paid to the employee either by way of notice or as an ex gratia payment, and anything earned by the employee after their dismissal, will be taken into account by the FWC when it calculates the amount of compensation. The maximum amount that the FWC can order is six months of the annual wage of the employee (up to a maximum of $72 700) at the date of dismissal.

If an order is made to reinstate the employee, the FWC may also order that the employer make up the difference in wages lost by the employee from the date of dismissal to the date of reinstatement up to the maximum amount of compensation.

The Fair Work Act provides for a 21-day time limit for an unfair dismissal application to the FWC.

Unlawful Dismissal

Unlawful dismissal is a different concept to unfair dismissal. An unlawful dismissal is a dismissal that is effected for a reason that is expressly made unlawful. Sometimes, a dismissal may be both unfair and unlawful. In short, an unlawful dismissal occurs when an employee is terminated for a reason that is unlawful.

Examples of unlawful reasons include a dismissal because of:

- the temporary absence of that employee from work because of illness or injury
- the employee's membership of a trade union or participation in the union's activities outside working hours or, with the employer's consent, during working hours
- a complaint made by the employee or proceedings taken against the employer by an employee
- the employee's refusal to negotiate, make or sign a certified/enterprise agreement
- the employee's application for or absence on parental leave
- an act that would amount to unfair discrimination under the Anti-discrimination Act or similar Commonwealth legislation (e.g. a dismissal because an employee is pregnant).

The Fair Work Act provides for a 21 calendar-day time limit for an unlawful dismissal application to the FWC.

Dismissal of ill or injured employees

Special rules apply to employees who are ill or injured, particularly if the illness or injury has occurred or was exacerbated during the course of the employment.

There are provisions in the Fair Work Act that protect employees who are temporarily unable to work because of illness or injury. There are also protections in the Queensland WRC Act that provide specific protection for up to 12 months for employees who are ill or injured because of something that has occurred at work (a compensable injury).

Temporary illness

It is unlawful for an employer to dismiss an employee if the reason for the dismissal is the temporary illness of that employee. In this context, 'temporary' means three months or an aggregation of three months absence because of illness or injury during a 12-month period.

There is a distinction to be made between terminating an employee because they are ill or injured and terminating an employee because that employee can no longer perform the inherent requirements of the position. Clearly, one may arise because of the other, and where an employee will no longer be able to continue in employment, the employer is not required to make a position available indefinitely.

It may also be unlawful under anti-discrimination for an employer to dismiss an employee because of an illness or impairment. Once again, a realistic distinction can be made if, as the result of illness or injury, an employee is no longer able to fulfil the inherent requirements of the position.

These are particularly difficult issues, and advice should generally be sought if an employee finds themselves in such a position.

WorkCover entitlements

The WCR Act may apply where an illness or injury arises out of or in the course of one's employment in Queensland (a compensable injury). In most circumstances, to be a compensable injury, employment will need to be a 'significant contributing factor' to the injury.

An injury to a worker is taken to arise out of, or in the course of, the worker's employment if the event happens on a day on which the worker is:

- at the place of employment and engaged in an activity for, or in connection with, the employer's trade or business, or
- away from the place of employment in the course of the worker's employment, or
- temporarily absent from the place of employment during an ordinary recess, if the event is not due to the worker voluntarily subjecting themselves to an abnormal risk of injury during the recess (for these injuries employment needs not be a significant contributing factor).

An injury to a worker is also taken to arise out of, or in the course of, the worker's employment if the injury happens on certain journeys related to the employment. For example, if the injury happens while the worker is on a journey:

- between the worker's home and place of employment, or
- between the worker's home or place of employment and a trade, technical or other training school that the worker is required, or expected, to attend, or

- for an existing injury for which compensation is payable to the worker, between the worker's home or place of employment and a place to obtain medical treatment, undertake rehabilitation or submit to a medical examination, or
- between the worker's place of employment with one employer and the workers' place of employment with another employer.

For these events employment need not be a contributing factor to the injury.

The employer must insure each employee against injury sustained by the worker for the employer's legal liability for compensation and the employer's legal liability for damages.

Chapter 4 pt 4 of the WCR Act requires an employer (who satisfies specific criteria prescribed under a regulation) to appoint a rehabilitation and return-to-work coordinator to provide or to assist in the rehabilitation of an ill or injured worker. Similarly, the worker is under a duty to participate in the rehabilitation process. Failing to participate may lead to the insurer suspending the worker's entitlement to compensation (ch 4 pt 5 WCR Act).

Because a key objective of the WCR Act is to encourage the prompt return to work and successful rehabilitation of the injured worker, an employee may be required to return to work on light or suitable duties while they recover before returning to their full-time normal duties.

The rules relating to unlawful dismissal and disability discrimination continue to apply to a worker with a compensable injury, but the WCR Act provides additional protections in certain circumstances. Where a worker has suffered a compensable injury, it is unlawful for an employer to terminate the services of that worker within 12 months after a worker sustains an injury if the reason for the termination is solely or mainly because the worker is not fit for employment in a position because of the injury. However, an application by the worker for reinstatement in these cases can only be considered if, upon hearing the application, the relevant Industrial Relations Commission is satisfied on medical evidence that the worker is in fact fit to resume work. However, even when there is no remedy for an injured worker under the WCR Act, the termination of an injured worker in these circumstances may still amount to unlawful or unfair dismissal or may even be a breach of that worker's rights under anti-discrimination legislation.

When (or if) it becomes clear that the worker will never recover sufficiently to carry out their pre-injury employment, then the employer and worker should consider either the possibility of redeployment or, if that cannot be reasonably done, the termination of the employment relationship.

General protections

Part 3.1 of the Fair Work Act contains additional causes of action for employees who have been injured in their employment for certain prohibited grounds. This provides a remedy for employees against unlawful detrimental action that falls short of dismissal. The general protections provisions also provide for remedies for employees that have been subjected to dismissal for prohibited reasons.

Generally, an employer must not take adverse action against an employee for reasons that include any of the following:

- The employee has exercised or proposed to exercise a workplace right.

- The employee has engaged in industrial activity.
- There is a discriminatory reason.

Industrial activity covers, amongst other things, both membership and non-membership of a union, and involvement or non-involvement in union activities.

Workplace right

A person has a workplace right if they are:

- entitled to the benefit of, or have a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body
- able to initiate or participate in a process or proceedings under a workplace law or workplace instrument
- able to make a complaint or enquiry either to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument or, if the person is an employee, in relation to their employment.

A typical example of the exercise of a workplace right is where an employee commences an industrial dispute proceeding against their employer in the FWC.

Adverse action

The general protections provisions are breached if a person takes adverse action against someone else because of one of the prohibited grounds. Examples of adverse action by an employer against an employee include:

- dismissal
- injuring the employee in their employment
- altering the position of the employee to the employee's prejudice
- discriminating between the employee and other employees of the employer.

A typical example of adverse action is where, in the scenario above, the employee was terminated for commencing an industrial dispute proceeding.

Adverse action only becomes unlawful if it was taken as a reprisal for the fact that the employee had exercised or had proposed to exercise their workplace right(s) or industrial activity. Once it is alleged by an employee that adverse action occurred for a particular reason, a reverse onus applies to the other party. That is, in the example above, the employer would be presumed to have dismissed the employee for their participating in the industrial dispute proceeding, unless or until the employer could lead evidence to the contrary.

Remedy

A FWC proceeding for breach of a general protections provision involving dismissal must be commenced within 21 calendar days of the dismissal.

A FWC proceeding for breach of a general protections provision other than a breach involving dismissal (e.g. where the employee continues to be employed and they have suffered adverse action such as refusal of shifts) must be commenced within six years of the alleged contravention.

If a person commences such a proceeding alleging that they were terminated for an improper reason, then the FWC must hold a conference to deal with the dispute. If a person commences a proceeding in the FWC alleging that they were subject to adverse action other than termination for an improper reason, then the FWC must, if the parties agree, hold a conference to deal with the dispute.

If either class of dispute is not resolved by the conference, then the FWC will issue a certificate to that effect. An applicant then has 14 days to commence a general protections court application in either the Federal Circuit Court or the Federal Court of Australia. Remedies available upon a general protections court application include reinstatement, compensation and civil penalties. There is no cap on compensation in this jurisdiction, unlike the unfair dismissal jurisdiction. The penalties imposed by the courts to date have in some cases been significant.

Workplace Health and Safety

The WHS Act imposes strict obligations upon all employers to ensure the health and safety of their employees at work. Failure to do so will result in prosecution with penalties of imprisonment and substantial fines at the disposal of the courts in appropriate cases.

There is a corresponding duty cast on all employees to be conscious and aware of their health and safety obligations, and in particular to comply with all safety directions given to them by their employers.

Wearing protective equipment when required or complying with specific procedures to undertake certain tasks are directions that must be complied with. Failure to comply with a reasonable direction may amount to misconduct sufficiently serious to justify the dismissal of that employee.

Every employer must ensure that the workplace is free from behaviour that might properly be described as bullying. There is no exhaustive definition of bullying, but bullying or workplace harassment can include verbal abuse or shouting at an employee, using or threatening to use physical violence upon an employee or playing practical jokes if that involves some physical discomfort or embarrassment.

Exclusion bullying is often perpetrated by employers. This will include deliberately leaving out employees from a group either in relation to social events or in the allocation of work. A breach of this standard is a breach under the WHS Act exposing the employer to the same penalties as any other breach under that Act.

In addition to being something for which employers might be prosecuted, the consequence of bullying an employee might be to create stress to such an extent that the employee becomes ill. This may give rise to a WorkCover claim by that employee or even, in sufficiently serious circumstances, a common law claim alleging a breach of statutory duty, namely a breach of the obligations owed to the employee under the WHS Act. Employees may also bring an application in relation to bullying in the FWC or the QIRC.

Workplace bullying

The FWC has the powers to make orders in relation to workplace bullying. With some exceptions, where a worker has been bullied at work, there is an entitlement to make an application for an order to stop workplace bullying.

For the purposes of these types of application, the definition is quite broad and includes contractors and sub-contractors, labour hire employees, work experience students and volunteers.

Bullying is defined as repeated unreasonable behaviour by an individual or group of individuals towards a worker that creates a risk to health and safety. This definition means one-off behaviour or behaviour that does not affect health and safety is not bullying. The bullying must occur at work, and work has been construed to have a broad meaning encompassing social media.

Actions taken by an employer that are considered to be reasonable management action carried out in a reasonable manner do not fall within the definition of bullying and cannot be complained about. For instance, a performance management plan that is put in place because of founded concerns about an employee's performance is not bullying. However, if the performance plan was executed in a way that was unreasonable such as by the employer not following their own relevant policies and procedures, it may not be excluded from the definition.

A worker who is bullied at work can make an application to the FWC at any time during their employment. On receipt of an application, the FWC has powers including conducting a conference or holding a hearing. If the FWC is satisfied the worker has been bullied at work and there is a risk they will continued to be bullied, it may make orders it considers appropriate to prevent the bullying. The FWC has no powers to award compensation or penalties in these types of applications as the jurisdiction is designed to restore working relationships so that all parties can continue with the employment relationship without negative effect upon the worker's health and safety.

A worker who is employed by the Queensland public sector or a Queensland local government is able to make a similar application to the QIRC.

Sexual harassment

The FWC also has the powers to make orders in relation to sexual harassment. Sexual harassment is defined as being conduct that is:

- an unwelcome sexual advance
- an unwelcome request for sexual favours
- other unwelcome conduct of a sexual nature in relation to another person.

Examples of sexual harassment can include (but are not limited to):

- inappropriate physical contact (such as unwelcome touching)
- staring or leering
- a suggestive comment or joke
- sexually explicit posters or pictures

- unwanted invitations to go out on dates
- a request for sex
- insults or taunts of a sexual nature
- sexually explicit emails or text messages.

Sexual harassment does not need to be repeated; a single incident is enough to amount to sexual harassment.

The conduct must cause a reasonable person to expect that the person being harassed would be offended, humiliated or intimidated by it. A person can also be sexually harassed by being exposed to or witnessing the conduct.

A worker who is sexually harassed at work can make an application to the FWC at any time during their employment. The process followed by the FWC is similar to the process outlined above for applications concerning workplace bullying. The FWC has no powers to award compensation or penalties in these types of applications as the jurisdiction is designed to restore working relationships so that all parties can continue with the employment relationship without negative effect upon the worker's health and safety.

A worker who is employed by the Queensland public sector or a Queensland local government is able to make a complaint to the Queensland Human Rights Commission.

Anti-discrimination

The Anti-discrimination Act covers two principal areas:

- An employee must not be discriminated against or victimised in relation to their employment.
- A workplace must be free from sexual harassment.

Discrimination

Both the Anti-discrimination Act and a variety of federal anti-discrimination laws protect employees at work from discrimination.

Work in this context includes pre-work processes such as job application, appointment (or lack of appointment), the nature of the work allocated, promotion and training opportunities, and the termination of employment.

The specific attributes in respect of which discrimination must not be practised include (but are not limited to) (s 7 Anti-discrimination Act):

- sex
- race
- religion
- age
- marital status

- sexuality
- gender identity
- pregnancy
- impairment.

Like all other areas covered by the laws, work-related unlawful discrimination can be direct or indirect.

Victimisation

It is unlawful for one or more persons in the workplace to threaten another person because that person:

- has made or has threatened to make a complaint about discrimination
- is involved with a proceeding under the laws
- refuses to do something that would be a breach of the laws
- asserts rights they have under the laws such as reasonable adjustment of their role if they have an impairment.

Typically, an employee will be victimised if an employer threatens to dismiss or take some other disciplinary action against an employee because they have chosen to make a complaint or otherwise insist on rights under the laws.

Employer's and manager's responsibilities

Often, unlawful discrimination, victimisation or sexual harassment is thoughtless behaviour on behalf of an individual. Although there is no one particular type of individual that conducts themselves in this way, it is more likely than not that there will be a power imbalance, perceived or real, between the victim and the perpetrator.

This being the case, managerial staff should ensure that all persons in the workplace are aware of their rights and responsibilities in relation to discrimination laws. This is generally achieved by most workplaces now having policies aimed at preventing these types of unlawful behaviour, and internal procedures for reporting and investigating complaints.

An employer will be liable for sexual harassment or discrimination by an employee in the course of their employment, unless the employer can show that they took reasonable steps to prevent the action from occurring. 'Reasonable steps' would include the imposition of appropriate policy documents concerning sexual harassment and the provision of training to employees regarding their policy obligations.

Formal complaint-handling procedure

If a person wishes to lodge a complaint about unlawful discrimination at work or in a work-related area, victimisation or sexual harassment, they must do so to the Queensland Human Rights Commission (QHRC) or the Australian Human Rights Commission (AHRC) within 12 months of the

date upon which the alleged discrimination occurred. The QHRC will investigate the person's complaint to establish if it has the jurisdiction to deal with it. Thereafter, the QHRC will attempt to conciliate the complaint by inviting the parties to a conference designed for that purpose.

If the complaint cannot be conciliated, on the person's request, the QHRC will refer the matter to the Queensland Civil and Administrative Tribunal for mediation and/or trial.

Similar powers exist for claims made to the AHRC. Any AHRC complaints, if not resolved by conciliation, can culminate in a trial in the Federal Circuit Court or the Federal Court of Australia.

It is not sufficient for a person making a complaint to simply believe they have been unlawfully discriminated against, victimised or sexually harassed. The complainant must meet the civil standard of proof (i.e. the balance of probabilities) by providing evidence showing that the unlawful conduct has occurred.

Limited defences apply to those companies or individuals responding to a complaint of unlawful discrimination in the area of work. Such defences include, but are not limited to, acts done in compliance with other legislation, genuine occupational requirements and workplace health and safety. The burden of proof in these circumstances is to be met by the company or individual relying on the defence.

If there is a finding at trial in favour of the complainant, the tribunal has the power to make a range of orders; the main one is compensation for loss suffered as a result of the unlawful discrimination, victimisation or sexual harassment. For more information, see the chapter on *Discrimination and Human Rights*.

Legal Notices

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